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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROBERT BOEHLERT,

Plaintiff and Appellant,

v.

CITY OF GLENDALE,

Defendant and Respondent.

B172237

(Los Angeles County
Super. Ct. No. BC284839)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Dan T. Oki, Judge. Affirmed.

Law Offices of Michael P. Calof and Michael P. Calof for Plaintiff and
Appellant.

Scott H. Howard, City Attorney, and Ann M. Maurer, Assistant City
Attorney, for Defendant and Respondent.

A retired police officer sued his former employer, claiming his pay was reduced because he suffered from a physical disability and in retaliation for filing a claim. His lawsuit was resolved against him by summary judgment and he now appeals. We affirm.

FACTS

From January 1978 to June 2002, Robert Boehlert worked for the City of Glendale as a police officer. During those years, his rate of pay increased by "Steps" from Step 1 through Step 5, with advancement determined by length of service and annual evaluations. Beyond Step 5, Glendale police officers are eligible for a "Merit Step" (M Step) pay increase as provided in a Memorandum of Understanding between the City and the Glendale Police Officers Association, but only "as a reward for job performance which exceeds standards of performance."

At some point before March 2000, Boehlert was awarded an M Step pay increase. On March 27, 2000, the City notified him of its intent to return his pay down to Step 5 because his annual performance evaluation resulted in a "below standards" rating based on his use of excessive sick leave. By administrative grievance, Boehlert challenged the City's "sick leave abuse" finding, but the City's Civil Service Commission upheld the City's decision, finding that Boehlert's "sick leave usage exceeded the acceptable average City sick leave usage." Boehlert did not pursue an administrative appeal.

While his grievance was still pending, Boehlert filed a complaint with the Department of Fair Employment and Housing, alleging that he "believe[d]" his M

Step pay had been "taken away . . . based on [his] disability (Diabetes and Sleep Apnea)." In March 2002, the Department issued a right to sue letter.

Boehlert retired in June 2002, then sued the City that November, alleging he was the victim of discrimination "based on a medical condition," and that the City had retaliated against him for filing an FEHA claim. The City answered and later moved for summary judgment, contending Boehlert's retaliation claim was barred (a) by his failure to raise that issue in his FEHA claim and (b) by his inability to prove a prima facie case of retaliation; and that he could not prevail on his physical disability claim because (a) the Civil Service Commission's decision precludes relitigation of this issue, and (b) Boehlert does not suffer from a cognizable physical disability.

Over Boehlert's opposition, the motion was granted, and this appeal is from the judgment thereafter entered.

DISCUSSION

In a series of related arguments that focus on the trial court's statement of reasons rather than the merits of Boehlert's case, Boehlert contends his FEHA claim was sufficient to put the City on notice of his allegation that it had failed to accommodate his physical disability, that the City in fact failed to accommodate his disability, and that his pay was reduced because he filed his FEHA claim. None of these claims have merit.

First, the Civil Service Commission's finding that Boehlert abused the City's sick leave policy is binding on this appeal. (*Knickerbocker v. City of Stockton*

(1988) 199 Cal.App.3d 235, 243.) More specifically, Boehlert is bound by the Commission's findings that he was properly deprived of his *merit pay* because his performance was "below standards" by reason of his excessive sick leave, and because "Step M should be reserved as a reward for job performance which exceeds standards of performance." In short, he wasn't penalized for being sick; he simply lost his entitlement to extra pay for service beyond the acceptable norm.

Second, the withdrawal of Boehlert's M Step pay did not constitute "retaliation" within the meaning of subdivision (h) of section 12940 of the Government Code, which makes it unlawful for an "employer . . . to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."¹ Quite plainly, Boehlert's claim that his pay was reduced because he filed his FEHA claim fails because he filed the claim **after** he lost his M Step pay, not before that action was taken. (*Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 476 [to establish a prima facie case of retaliation, the plaintiff must show there is a causal link between a protected activity and the employer's action].)

Third, Boehlert's failure to allege retaliation in his FEHA claim is fatal to his civil cause of action for retaliation. (§ 12960, subd. (b) [the claim must state the unlawful practice that is the subject of the employee's dissatisfaction]; *Okoli v. Lockheed Technical Operations Co.* (1995) 36 Cal.App.4th 1607, 1612.)

¹ All section references are to the Government Code.

Fourth, the uncontroverted evidence -- Boehlert's own deposition testimony -- establishes that neither Boehlert's diabetes nor his sleep apnea affected his ability to perform his job during the period of his employment (and Boehlert's brief on appeal does not point to any evidence to the contrary). As a result, he did not suffer from a physical disability within the meaning of subdivision (a) of section 12940. And although Boehlert's complaint speaks in terms of a "medical condition," his FEHA claim spoke only about a "physical disability." In any event, there is no evidence that Boehlert's "conditions" affected his ability to work.²

In sum, this is a meritless action.

² Since Boehlert did not suffer from a cognizable physical disability, there was nothing for the City to accommodate.

DISPOSITION

The judgment is affirmed. The City is entitled to its costs of appeal.

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VOGEL, J.

We concur:

SPENCER, P.J.

MALLANO, J.